# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 26, 2004 |
| v | No. 250010<br>Delta Circuit Court |
| JESSE LLOYD SMITH,<br><br>Defendant-Appellant. | LC No. 02-006955-FH |

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for breaking and entering a building with intent to commit larceny, MCL 750.110. Defendant was sentenced to three years' probation, with the first nine months to be served in the county jail.[1] We affirm.

Defendant argues that there was insufficient evidence to support his conviction. We disagree. A challenge to the sufficiency of the evidence presented at trial may be raised for the first time on appeal and need not be preserved in the trial court. *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987). The test for determining the sufficiency of evidence in criminal cases is "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). A reviewing court should not interfere with the jury's role of determining the credibility of witnesses and the weight of the evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). The prosecutor is not obligated to disprove every reasonable theory consistent with innocence. *Nowack*, *supra* at 400. Rather, the prosecutor has to only prove the elements of the case beyond a reasonable doubt. *Id.* The *Nowack* Court stated:

> The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. "'Circumstantial evidence and reasonable inferences arising from

[1] The judgment of sentence indicates that defendant is a second-habitual offender, MCL 769.10.

> that evidence can constitute satisfactory proof of the elements of a crime.'" *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). [*Nowack, supra* at 400.]

The elements of breaking and entering with intent to commit larceny are: "(1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and the entering, the defendant intended to commit a larceny therein." *People v Cornell*, 466 Mich 335, 360-361; 646 NW2d 127 (2002)(citation omitted). To be convicted on an aiding and abetting theory, the prosecution must prove that a defendant procured, counseled, aided, or abetted in the commission of a crime. MCL 767.39; *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). An aider and abettor is a person who is present at the scene of the crime and by word or deed gives active encouragement to the principal perpetrator of the crime, or by his conduct makes clear that he is ready to assist the principal if assistance is needed. *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004)(citation omitted). To convict a defendant under an aiding and abetting theory, the prosecutor must establish that (1) the crime charged was committed by the defendant or some other individual, (2) the defendant gave encouragement or performed acts that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or he had knowledge that the principal intended its commission when the defendant gave aid and encouragement. *Id.* at 67-68. "Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime." *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999)(citation omitted).

We conclude that sufficient evidence was presented at trial to support defendant's conviction under an aiding and abetting theory. Francesca Smith, defendant's cousin, testified that she was with defendant, Anthony Miley, and two other women on the night of the break-in. Ms. Smith testified that while the five were out driving around, one of the other women brought up the idea of breaking into the C&C Market. As the talk of the break-in became more serious, Ms. Smith and one of the other women got out of the car. The woman remaining in the vehicle then drove defendant and Miley to the vicinity of the C&C Market. Miley and defendant then exited the car and headed toward the store entrance. The woman driver testified that she saw either Miley or defendant throw something through the glass door of the store, and then saw both men move toward the building. She did not see anyone actually enter the building. She also testified that about five minutes later, Miley and defendant returned to the vehicle. Defendant was carrying a bottle of liquor, and Miley was carrying a bottle of liquor, a case of beer, and some cigarettes. Scott Palmgren, who lived across the street from the C&C Market, testified that his dog's barking on the night of the break-in awakened him. When he looked out the window, he saw a person outside the store "kind of looking back and forth." He then saw another person come out of the C&C Market "with something in his hands." Finally, he witnessed the two run away from the store.

Other testimony presented at trial established that the front glass door to the C&C Market had been smashed, as had the lower panel of the inner glass door. Video cameras recorded the break-in, and the tape showed one individual inside the store, who appeared to be taking items from the store. The individual on the tape was not identified because the image was unclear.

Police interviewed defendant who initially denied that he knew anything about the break-in. Later, defendant admitted to Michigan State Trooper Patrick Madden that he was there, but

that it was Miley who threw the rock through the doors and Miley who entered the building. Trooper Madden testified that defendant told him that after he initially took a case of beer that Miley handed to him, defendant put it down and told Miley that he did not want to get involved. There was testimony that defendant and the others later drank the alcohol taken from the store.

Viewed in the appropriate light, this evidence is sufficient to support defendant's conviction. The jury could have reasonably found that defendant voluntarily went to the store with full knowledge that a breaking and entering was planned, failed to leave the situation early as two friends had done, thus suggesting agreement with the plan, acted as a lookout or even possibly broke into the store, and assisted in carrying merchandise from the scene. Defendant did testify that he never wanted to be involved in the break-in and that he only went up to the store to try to talk Miley out of breaking into the building. Defendant also testified that he refused to take the case of beer from Miley when requested. However, the jury, as trier of fact and sole judge of witness credibility, *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998), was free to disbelieve defendant's testimony.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey